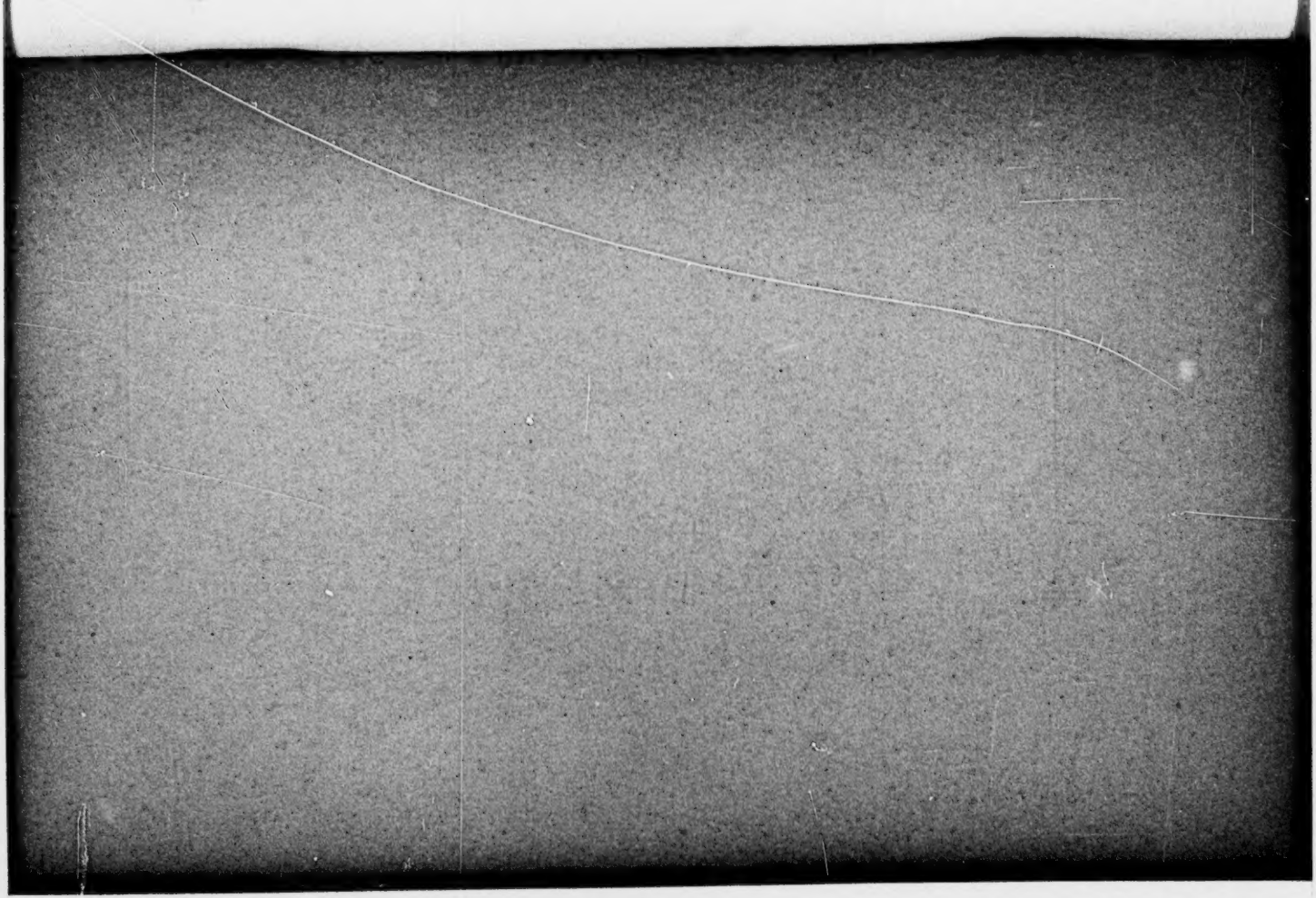

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IN THE

Supreme Court of the United States

No. 74-1460

RICHARD G. AUGENBLICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INTRODUCTION

This is the second occasion on which this Court has scrutinized the Augenblick court martial. Six years ago this same court martial came to this Court for review after the Court of Claims found violations of this naval commander's rights under the Jencks Act so egregious that constitutional due process had been denied him. This Court disagreed.[1] But it

[1] *Augenblick v. U.S.*, 393 U.S. 384 (1969).

disagreed (and reversed the Court of Claims) on the sole ground that the Navy's violations of the Jencks Act did not constitute constitutional injury. Along with other irregularities, the Jencks Act violations remain unexcused in the record of this court martial.

In the litany of misdeeds perpetrated in this military prosecution, the Jencks Act violations are but one example. They are joined by the conviction of this officer of a crime for which he was never charged nor tried, following his acquittal of the crime for which he was charged and tried. And, indeed *these* combined irregularities are not alone. Perhaps the most striking of the additional meanderings of military justice in this case is the out-and-out lobbying of the judges of the Court of Military Appeals within the military establishment and within the Department of Justice, urging extrajudicially that the original Court of Claims judgment in favor of this officer be reviewed by the Supreme Court. Thereafter that same Court (the Court of Military Appeals) again sat in judgment on this man, without so much as a thought of its earlier role as his adversary in the extrajudicial cloakrooms of military justice.

We bring to this Court three specific points for review, raised by the most recent opinion of the Court of Claims, dated January 22, 1975 in this case. The first is conviction of this officer under Section 134 (UCMJ) as a "lesser included crime"; the second is the application of *O'Callahan v. Parker,* 395 U.S. 258 (1969) to this case. The third is plenary review of the constitutional errors in this military prosecution. These errors were simply a part of a pattern of persistent irregularity at each level of military justice, all aimed at purging the Navy of this officer.

That is why, six years after this case first appeared before this Court, *Augenblick* has not and will not simply disappear. Too many consciences remain deeply troubled to permit the Navy to bury this court martial. And, in a larger sense, if the Navy is permitted to inter the record of this prosecution it will then have license to do promiscuously what it did in its major aberration in this case: utilize Article 134 to pin guilt – any kind of guilt – on a military defendant when its properly constituted prosecution failed.

STATUTES INVOLVED

Article 134 (10 U.S.C. 934) of the Uniform Code of Military Justice provides:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the Armed Force, all conduct of nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the Court."

Article 125 of the Uniform Code of Military Justice (10 U.S.C. 925) provides:

> "(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.

Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

Article 80 of the Uniform Code of Military Justice (10 U.S.C. 880) provides:

"(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

Article 79 of the Uniform Code of Military Justice (10 U.S.C. 879) provides:

"An accused may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein."

CONSTITUTIONAL PROVISIONS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

QUESTIONS PRESENTED

(1) Was Section 134 (Uniform Code of Military Justice) constitutionally applied to the Petitioner as a "lesser included crime" within Section 125 (UCMJ), in a court martial in which Petitioner was never charged or tried for a violation of Section 134 and was acquitted of a violation of Section 125?

(2) Should *O'Callahan v. Parker*, 395 U.S. 258 (1969) be applied retroactively to the Petitioner's court martial?

(3) Should this Court review the entire record of the Augenblick prosecution for cumulative constitutional deprivations suffered by this Defendant?

STATEMENT OF THE CASE

The following facts bear on the issues before the Court:

(1) *Events of January 12, 1961*[2]

In the early morning hours of January 12, Commander Augenblick was having a cup of coffee in an all-night diner in downtown Washington. Conversation commenced between Commander Augenblick and Hodges, an airman stationed at Andrews Air Force Base. Both men were on liberty. Hodges was in uniform (R-VI-52),[3] but Commander Augenblick was in civilian clothes (R-VI-55). The two had not known each other before this time, and Hodges did not know of Commander Augenblick's association with the military until after the two were arrested (R-III-83, R-IV, Govt. Ex. C, R-V-18).

Commander Augenblick and Hodges left the restaurant when the Commander offered to give Hodges a ride back to

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[2] Prior to January 11-12, 1961 Commander Augenblick has served the Navy with distinction for the 18 years he had been in service. His duty had included combat and destroyer command experience, schooling at the Naval War College, service in the office of the Secretary of Defense and the Strategic Plans Division of the Office of Naval Operations. His record was without blemish, and he had been selected for promotion to a Captaincy.

[3] All record citations are to the volumes of the record of the military prosecution on file in the Court of Claims.

Andrews Air Force Base (R-Vii-257). After driving for a short while, the Commander parked his car on West Basin Drive, near the Tidal Basin. The Commander testified at both court martials that he had drunk some Scotch and beer and intended to go to sleep (R-Vii-249); Hodges claimed that Commander Augenblick, rather than dozing off, committed an act of oral sodomy on him (R-VII-260; 263).

At this point, a civilian policeman approached the car, opened the door, and asked the occupants to step outside, took identification from each separately and instructed the two men to proceed in Commander Augenblick's car to the Third Precinct Station (-VI-567). There both men were formally booked and charged with disorderly conduct, a misdemeanor under the District of Columbia Code (R-VI-157). Both men at this point denied any misconduct (R-VI-57).

The arresting officers immediately contacted the Naval authorities. Commander Augenblick and Hodges were then driven directly to the Naval Weapons Plant in Southeast Washington, and turned over to Navy personnel at that installation (R-VI-157).

After a pre-trial hearing and one abortive court martial, the second Augenblick Court Martial convened approximately eight months after the above events. The following deals with that Court martial and its review within the military courts.

(2) *The Jencks Act Violations*

Although the Jencks Act violations have already been reviewed by this Court, the facts of these infringements are relevant to the present controvery. These facts which are described fully in the original Court of Claims opinion

(377 F2d 586 at 588), have never been refuted, nor has this Court (or any other Court) modified the determination that this officer's statutory rights were repetitively violated. These facts bear on the uniformity of irregularity meted out to Augenblick in his Naval prosecution:

> "The challenged rulings involve the early-morning interrogation of Airman Hodges immediately after the arrest. At the civilian police station, both the commander and the airman denied that 'anything' had happened. After being turned over to the Armed Services Polic, they were brought to the headquarters of the Potomac River Naval Command at the Naval Weapons Plant in Washington for interrogation. It was then about three o'clock in the morning of January 12, 1961. The airman and the accused were questioned separately in a room designed for the monitoring and recording of conversation. Agent Connor of the Office of Naval Intelligence (ONI), observed, asked some questions, and took notes. After twenty to twenty-five minutes Connor accompanied the twenty-year old Hodges to the separate Air Force OSI headquarters in Maryland where Hodges swore to a five-page written statement describing the evening's events. After the Hodges' session at the naval station, Mendelson interrogated the accused for about two hours. During both interviews at the naval station, Agent James, the duty officer at that post, was in the adjacent room. He testified unequivocally that he had made tape recordings of both sessions —one reel of the Hodges and two reels of the Augenblick interrogation.

At the second court-martial, Hodges' testimony touched on his interrogation at the Naval Weapons Plant. After trial counsel's direct examination, the defense moved, pursuant to the Jencks Act, for production of the tape recording transcribed by Agent James and for the handwritten notes taken by Agent Mendelson during the interrogation. The law officer ordered either that the tape-recording be produced or that the Government produce witnesses at an out-of-court hearing who 'can explain' its non-existence if the tape were not available, but refused to order production of Mendelson's notes.[8] The Government did not produce the Hodges' tape-recordings, but called as witnesses each of the intelligence officers who had contact with the recording, except Agent Mendelson who was in Norfolk at the time of the second trial in Washington. The upshot of the testimony was that, though James testified that he had made the tape, no one then had it or had heard it or knew what had happened to it. The defense urged the calling of Mendelson but the law officer, after reading the record of Mendelson's testimony on the tape-recording at a pre-trial investigation, refused to have him called as a witness and concluded that no sanction should be imposed on the prosecution for failing to produce the recording. The Board of Review (with dissent on this point) affirmed, holding,

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[8] The prosecution had proffered Hodges' written statement made later at Air Force headquarters, but the defense had declined the offer.

> among other things, that "It was the responsibility of counsel for defendants [sic], to pursue ascertainment of correctness of the Government's claim that the tape-recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government.'"

One additional fact should be added to the Court of Claims summary of the Jencks Act facts:

During the examination of Hodges at the second court martial it developed that he had been told by his Commanding Officer at Andrews Air Force Base that he was to be given an honorable discharge some two years prior to the end of his tour of duty. But his discharge was not given him outright. He was kept in service, in off-duty status at Andrews and was honorably discharged shortly after the termination of the second court martial at which he had persisted in his incriminating testimony against Commander Augenblick (R-VI-152, 153; the government stipulated as to the date of Hodges' discharge in this action).

(3) *Acquittal of Sodomy; Section 134 emerges.*

The following facts bear on this Petitioner's contention that Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934), the so-called "General Article", was unconstitutionally applied under the facts and circumstances of this case.

No testimony was offered during this court martial as to any offense except the alleged sodomy. The prosecution never offered a witness as to whether this private conduct between Commander Augenblick and Hodges (assuming that any sexual activity took place between them)

would have affected "good order and discipline" or would bring discredit upon the armed forces," and if so, how. At the close of testimony when the record was closed, the law officer indicated to counsel that he would instruct the court that if it found Commander Augenblick innocent of the sole charge against him (under Article 125) it could, notwithstanding, find him guilty of a violation of Article 134 as a lesser included charge, with a specification of committing lewd and lascivious conduct. This was the first mention of Article 134 as a lesser included charge, with a specification of committing lewd and lascivious conduct. This was the first mention of Article 134 at this court martial. Counsel for Commander Augenblick objected to the instruction (R-VII-369; VI-333).

In instructing on Article 134, the law officer went no further than reading of the Article, instructing simply that if the members of the court determined that the Commander was innocent of sodomy, they might yet find him guilty if the conduct they found to have occurred on January 12 was "to the prejudice of good order and discipline" or "of a nature to bring discredit upon the armed forces." No instruction containing a further definition of those phrases, nor any objective standards by which the conduct in question would be measured against the words of Article 134 was provided by the law officer (R-VII-369).

After the Court commenced its deliberations, it requested consultation with the law officer and reported it had voted to acquit Commander Augenblick of the charge under Article 125.

On the record but in the absence of counsel, the president of the court then informed the law officer that it had voted to convict Commander Augenblick under Article 134, and requested the law officer for language necessary

to draft a specification under Article 134. As a result of this fixing of a specification after all testimony and argument had been completed, the court found Commander Augenblick guilty of a violation of Article 134 and sentenced him to dismissal from the service with total forfeitures (R-VII-380-381, 404).

(4) *Action of the Navy Board of Review*

At the next level of military justice, the Navy Board of Review, in a 2-1 decision, affirmed the conviction of the court martial. The dissent held that Augenblick's Jencks Act rights had been violated to his substantial prejudice, and disagreed with the affirmance on this score.

The Board of Review majority (and on this point there was no dissent) also dealt with the question – raised on appeal by Augenblick's Counsel – that in light of the law officer's instruction that a "lewd and lascivious" act within the purview of Section 134 was a "lesser included offense" to the charge of sodomy originally leveled at the defendant, "disorderly conduct", within the same section should have been made available to the court. The latter specification, although within the same Article, carries a far lesser punishment. The Board of Review rejected this argument, independently evaluating the evidence and determining that the record supported a conviction under one kind of violation of 134, but did not support the other.

(5) *Action by the Court of Military Appeals*

The Court of Military Appeals first rejected consideration of Commander Augenblick's case on January 11, 1963. It then denied reconsideration of this action on January 29, 1963. Petitioner was then dismissed from the Navy, with the loss of all pay and allowances.

This was not, however, the last action by the Court of Military Appeals in this case (see subsection 6(a) of this Statement, Infra).

(6) *Proceedings in Civilian Courts*

Following the rejection of his appeal by the Court of Military Appeals, Augenblick filed suit on October 22, 1964 for back pay in the Court of Claims. Since he had never been incarcerated, this suit represented the proper vehicle for contesting the constitutionality of what had occurred during his military prosecution. On May 12, 1967 the Court of Claims entered a unanimous opinion in Augenblick's favor, holding that his naval conviction was vitiated by the Jencks Act errors which tainted his prosecution.

(a) *Extrajudicial Intervention by the Court of Military Appeals*

Immediately after the Court of Claims entered its decision in favor of Commander Augenblick (in *Augenblick v. United States*, 377 F2 586), the Court of Military Appeals, acting entirely extrajudicially, engaged in a direct campaign to influence the Department of the Navy to urge, and the Department of Justice to embark on an appeal of this Court's decision. These moves, recorded by the Clerk of that Court in the public files of the Court, were made, as the Clerk states within these records, "on behalf of the Court". Personal knowledge and participation in this extrajudicial urging on the part of at least two members of that Court are reported in these documents, all detailed in documents from that Court's records set out in Appendix A to this Brief. This strange episode is described in further detail in Section II(D) of this Petition, infra.

(b) *This Court's Earlier Action in Augenblick*

With the extrajudicial prod from the Court of Military Appeals, the Department of Justice filed a petition for a writ of certiorari in this case. This Court then granted the writ. After briefing and argument, this Court reversed the Court of Claims on January 14, 1969 (*Augenblick v. U.S.*, 393 U.S. 1969) holding that the Navy's infringement of Augenblick's Jencks Act rights were violations of statute, but did not constitute constitutional injury.

(c) *Procedural History in the Court of Claims Since 1969*

Since then the procedural history of this cause is complex. In summary, the cause remained alive and undismissed in the Court of Claims both before, and following this Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969), rendered less than five months after *Augenblick*. Immediately after *O'Callahan* came down, (again before this cause had ever been dismissed) Petitioner filed his second amended petition before the Court of Claims, seeking to apply the *O'Callahan* service-connection test to this case, and questioning the use of Article 134 as a lesser included crime.[4] Action in that Court was then, in effect, stayed until this Court acted definitely on the retroactive application of *O'Callahan* and on the constitutionality of Section 134. On three occasions the Petitioner asked that Court

[4] An earlier Petition for a Writ of Certiorari, seeking review of the Court of Claims dismissal of Petitioner's first amended Petition was filed in this Court on September 2, 1968. It is superseded by this Petition; the Court of Claims dismissal was stayed by action of that Court dated October 31, 1969. Accordingly Petitioner's original suit in the Court of Claims is the suit before this Court now. This original action has never been dismissed (and Plaintiff has never been out of Court) since the filing of this suit in the Court of Claims.

to schedule argument and reach a disposition of the case, but that Court refrained while either of these issues were pending before this Court.

(d) *Re-Intervention of the Court of Military Appeals*

It was during this period that Petitioner asked the Court of Military Appeals to review his case in light of *O'Callahan*.[5] This was done to exhaust all remedies before the military courts while this cause was pending in the Court of Claims. It was on this occasion that the Court of Military Appeals, which had labored so assiduously and extrajudicially to convince the military establishment and the Department of Justice to seek review of the original Court of Claims judgment in favor of this Petitioner (all unbeknownst to Petitioner and Counsel), proceeded to sit in judgment on this case and, predictably, ruled against the Petitioner.[6]

(e) *Final Action by the Court of Claims Leading to This Petition*

Finally, after *Gosa v. Mayden*, 413 U.S. 665 (1973), *Parker v. Levy*, (No. 73-206, decided June 19, 1974) and *Secretary of the Navy v. Avrech*, (No. 72-1713, decided July 8, 1974) the Court of Claims ordered argument in this cause, and on January 22,[7] 1975 issued its opinion

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[5] Activity of the judges of this Court (seeking to induce review of the original Court of Claims judgment in Petitioner's favor) was unknown to Petitioner and his Counsel until September of 1971, long after the lobbying of the CMA's judges (1967-1968) and the second action of the Court of Military Appeals took place.

[6] Described in detail in Section II(D), *infra*.

[7] Stayed, by its own terms, for 30 days (slip opinion p. 8), or until February 22, 1975.

ruling against the Petitioner on both the *O'Callahan* and the Section 134 contentions. That opinion is attached as Appendix B. It is from that ruling that the present Petition seeks review by this Court.

SUMMARY OF ARGUMENT

I:

Section 134 (UCMJ) was unconstitutionally applied to the Petitioner as a "lesser included crime" within Section 125, the Petitioner having been acquitted of violating Section 125.

(A) This is a benchmark decision on Section 134.

(B) The constitutional problems of using the General Article as a "lesser included crime" are: notice, proof and specificity.

II:

The record as a whole in *Augenblick* reflects basic unfairness; This Court should review it either under *O'Callahan* or on independent grounds.

ARGUMENT

I: *Section 134 (UCMJ) was unconstitutionally applied to the Petitioner as a "lesser included crime" within Section 125, the Petitioner having been acquitted of violating Section 125;*

(A) *This is a Benchmark Decision on This Point:*

Although some form of the General Article has been present in military jurisprudence since Independence, its unique breadth and catch-all character was never tested in

civilian courts until *Levy* and *Avrech*. The reason for this is quite simple: until this Court, in the late 1940's articulated the rule that servicemen possess substantial constitutional rights protected by the civilian courts, all Article III courts restricted themselves (in review of military convictions) to an inquiry into whether the military court had jurisdiction over the Defendant. Once the military court's basic, in personam, jurisdiction was established, civilian courts refrained – until thirty years ago – from inquiry into the merits (constitutional or otherwise) of the military prosecution.

Thus it was that *O'Callahan, Levy* and *Avrech* were the first inquiries made by Article III courts into this unique statute. *O'Callahan* made it clear that Section 134 could not be used to extend the military jurisdiction into non-service connected offenses. *Avrech* and *Levy* held that the General Article was not unconstitutionally vague (or overbroad) on its face. The issue posed in the case at bar, viz., use of the General Article as a "lesser included crime", has, therefore, never been adjudicated by this Court before.

(B) *The constitutional problems of using the General Article as a "lesser included crime"; Failure of notice, proof, and specificity; the view of the Court of Claims:*

The most orderly means of examining the litany of doubts spawned by modern-day application of the General Article is to probe its use in this case.[8] The constitutional

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[8] The validity and applicability of our arguments regarding the constitutionality of Article 134 as used in this case is, of course, wholly independent of the issue of the retroactivity of the service-connected doctrine of *O'Callahan v. Parker.*

difficulties raised by the Navy's recourse to Section 134 against Commander Augenblick are not limited to the Article's vagueness. It use here is constitutionally defective on three scores: (1) This defendant had no notice that the Article would be used against him and palpably could not defend himself against the charge; (2) The Court Martial took no evidence whatsoever on two major elements of the Article, leaving those elements totally unproved; (3) The seven members of the Court were permitted to interpret the Article subjectively, depriving this crime before them of any objective definition.

Finally, we shall demonstrate that the Court of Claims opinion of January 22 solves none of these problems, but rather preserves the General Article as a trap for military Defendants and a catchall used by military prosecutors to salvage a conviction when all orderly means fail.

(1) *Notice*

The first difficulty arising from the Navy's use of the General Article against Commander Augenblick arises from the failure of the Navy to charge him of its violation. Section 134 was never mentioned until all evidence was in at the court martial, and defendant was wholly disabled from defending himself against the charge. It arose at that point when the law officer (over the objection of defense counsel) was preparing to instruct the court immediately before the case was submitted to its members for their consideration and verdict. It was made available to the Court as a "lesser included offense" within the charge[9] actually levied against the defendant.

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[9] Sodomy, under Article 125, U.C.M.J. Article 134 was *not* charged at the outset, or during the proceeding except at its close.

(a) *The requirement of "necessary" inclusion and notice to the Defendant in both civilian and military law.*

The concept of a "lesser included charge" is one that has frequently troubled courts because of the inherent problem of notice to the defendant that he may be convicted of a crime which, at least *in haec verba,* is not charged against him. Civilian courts dealing with this problem have developed simple safeguards against abuse. Rule 31(c), Federal Rules of Criminal Procedure embodies one such safeguard:

> "The defendant may be found guilty of an offense *necessarily* included in the offense charged or of an attempt to commit either the offense charged or an offense *necessarily* included therein if the attempt is an offense." (Emphasis supplied.)

The use of "necessarily" imparts definite standards, both legally and as a matter of factual guarantee that the defendant be given some inkling that hidden beneath the language of his indictment there exist other accusations of which he is in jeopardy. In the many cases where a conviction of a "lesser included offense" is reached, no one could doubt either its validity or the palpable notice given the defendant of the plural charges against him (viz., 2nd degree murder, manslaughter and assault in 1st degree murder cases; all attempts to commit crimes, where the attempt itself is criminal). The rule has sense and some considerable fairness based on the reasonableness of notice.

Where, however, this notice is less than fair and clear, the civilian courts have balked. Perhaps the most cogent formulation of this is found in *Kelly v. United States.* 370

F2d 227, a 1966 opinion in the District of Columbia circuit. The defendant, charged with sale-facilitation in the indictment, asked the court to instruct on the lesser included offense of possession of narcotics. Possession was not included in the indictment, but proof of possession was adduced at trial. Judge Leventhal wrote, in language notably applicable to the case at bar:

> "Although the doctrine may also be invoked by defendant, his right to invoke it does not extend beyond the right of the prosecutor. The right of the prosecutor *is limited to the offense of which the defendant has been given notice* by the indictment and the defendant is not subject to conviction for other offenses because of the nature of the proof. What *is controlling is the offense charged in the indictment, not the offense established by the trial proof,* whether it is the prosecutor or the defendant who is seeking extension from the offense charged to another offense as "necessarily included." (Emphasis supplied.) 370 F2d Ct. 229.

If "notice by the indictment" is the standard in civilian courts, the same rule – at least nominally – applies to the military. The requirement of Article 32(b) of the Uniform Code that "The accused shall be advised of the charges against him" can be met in no other way. Section 79 of the Uniform Code defines a "lesser included offense" in terms undistinguishable from its civilian counterpart:

> "An accused may be found guilty of an offense *necessarily* included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein." (emphasis supplied)

The test, then, is whether Commander Augenblick had "been given notice" that the statute[10] finally relied on by the Navy court for its conviction was available to it to convict him, and whether this notice necessarily arose from the charge placed against him at the outset.

(b) *Failure of Notice in Augenblick; What the Manual did not say;*

The only specific information that a serviceman might have of the range of charges not appearing on the face of his indictment but nonetheless available for use by the Court is the notice provided by the Manual for Courts Martial. The Code itself requires that each serviceman be read the Code and that its punitive sections be explained to him.[11] The regulations which supplement the Code (and their explanation) comprise the Manual, which by statute must be made readily available to each serviceman. Indeed, the prescribed availability of the Manual has been looked to as satisfaction of the notice requirement for servicemen explicitly charged in advance of trial under Article 134, *United States v. Frantz*, 2 U.S.C.M.A. 161 (1953).

Appendix 12 of the Mnual lists "commonly included offenses". The 1951 Manual, which with its 1959 Supplement, was in effect in 1961 when Commander Augenblick's alleged offense and trial took place, lists *no* offenses as included within Section 125. It was not until the issuance of the 1968 Manual that Section 134 was listed as an included offense within a Section 125 charge. Thus, the commonest form of notice to all servicemen of the

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10 Article 134 (10 U.S.C. 934).

11 Article 137, (10 U.S.C. 937).

multiplicity of offenses he is in peril of, though not charged with, could not be given in Commander Augenblick's case.

(c) *The Court of Claims formulation and its broad license to military prosecutors.*

It is clear, thus, that both civilian and military law permit the application of a "lesser included crime" to a defendant only if it is thoroughly clear to that defendant *at the outset of his prosecution* that he is in jeopardy of a conviction for this included crime. Any other use of the "lesser included crime" would clearly violate the Defendant's rights to constitutional due process and the fair opportunity to defend himself, be he civilian or serviceman.

The Court of Claims defends what occurred in the Augenblick court martial by pointing to a "specification" under Section 134 existent in 1961 when the court martial took place, proscribing "lewd and lascivious conduct." The Court states:

> "Particularly in view of Article 134's specific coverage of indecent and lewd acts, the accused must have known that in those circumstances he could be found guilty of the related, lesser offense of lewd and lascivious conduct. That would be the reasonable expectation, borne out by prior holdings of the military tribunals included in an offense such as sodomy under Article 125 or rape under Article 120. . ."

> "In the constitutional sense – that a Defendant must not be convicted of a charge of which he has inadequate notice . . . there was here sufficient notice that the offense of

> indecent, lewd and lascivious conduct under Article 134 could and might well be implicated." (slip opinion p. 6)

There are three insuperable constitutional flaws in the Court of Claims rationale. The first is the most obvious one: the Navy, in 1961, did not consider any of the specifications under Article 134 as "lesser included crimes" within Article 125, and said so in the Manual for Courts martial, albeit with the caveat that the Manual's list of included crimes was to be used with caution. Regardless of this caveat, this omission is fatal to the proposition that the inclusion of 134 within 125 is *necessary*, as required by Article 79 (UCMJ) and by all criminal law – in order to preserve the right of the Defendant to know of what he is charged.

The second difficulty is the fact that the specification "lewd and lascivious conduct", relied on so heavily by the Court of Claims as giving notice to this Defendant of what he might be charged with, is – as are all "specifications" of misconduct in military law – found nowhere in the statute passed by Congress, the Uniform Code. "Specifications" are merely guides for the use of prosecutors in drafting charges, so that Defendants will understand the precise facts to be proved against them. The listing of specifications within the Manual has no sanctity of law. It is, indeed, a moveable feast which the military authorities can change unilaterally at will. Examination of various authorities can change unilaterally at will. Examination of various editions of the Manual make it totally clear that the military authorities can create or abandon these "specifications" any time they wish. Indeed, "specifications" cannot be definitions of new crimes because Congress has never delegated to the military authorities the power to create and define new crimes.

"Specifications" (such as "lewd and lascivious conduct") are therefore included within Section 134 – or not included therein – not as definitions of crimes of which a military Defendant might be in jeopardy of, but merely as examples of the verbiage necessary to put Defendants on notice of charged facts *in those cases in which Section 134*[12] *is being charged at the outset.*

The Court of Claims has turned this laudable function of "specifications" completely backwards. Far from insurance that military defendants are fully apprised of the exact facts to be proved against them, the Court of Claims notion of a "specification" seems to be that it constitutes a definition of a crime not found in the statute (or in the indictment) but nonetheless available to prosecutors if, at the close of trial, their cases under the statute have failed. To begin with, Congress intended no such legislation of new crimes by military prosecutors. But in the special case of Section 134, "specifications are particularly essential to a fair trial because the language of the statute tells the Defendant little or nothing of what he is being charged. And the whole point of providing "specifications" at the outset for military defendants charged with Section 134 runs exactly counter to the strange use of a "specification" by the Court of Claims, in a case where that Section was never charged at all.

This case illustrates a distortion of the use of both "specifications" and the General Article, itself. The problem of notice under the General Article is well known to military authorities, which avoids its use when more specific provisions of the Code can be used:

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12 or any other article of the Code.

> "When an offense is specifically defined in a particular punitive article, it ordinarily should be charged under that article rather than under Article 134, the general article." *Manual for Courts martial,* 1951 Edition, p. 30*

The reason is obvious. Notice to the Defendant suffers when the precise sections of the Code are abandoned for the sweeping phrases of the General Article. That prejudice is often unremedied by the specifications under the General Article which, themselves, are often uninformative. But when a military prosecutor goes one step further, as in *Augenblick,* and charges under a substantive article of the Code, fails in his proof, and then, at the end of trial interjects the General Article with a "specification" drawn from the closed record, notice to the defendant becomes a mockery.

(d) *What is not being argued herein*

Certainly a serviceman who engaged in sexual irregularities can and should expect punishment. That is not the point here. We must concede, after *Levy,* that notice of the criminality of such acts is chargeable to all servicemen. That is also not the point here. Notice that conduct is criminal is a very different thing from notice of the charges against you. The former goes to overbreadth and vagueness of the statute and is not being argued in this Petition. The latter goes to the ability to defend one's self at court martial. It *is* being argued here. It is being argued here because Augenblick was not and could not have been aware that Section 134 was *necessarily* embraced by Section 125.

No substantial revision of legal practices within the military establishment is being urged herein. Augenblick could

just as easily have been charged in the first instance with a violation of Section 134. Or he could have been charged with an attempted sodomy under Section 79. In either case he would have been put on notice of what the prosecution intended to prove against him. He then could have defended. It could have been as simple as that.

(2) *Proof*

The second constitutional defect in the use of the General Article in this case is that its elements were not proved. The complaint here is not a simple lack of evidence; it is failure of any attempt to prove two elements of a crime.

What transpired after the law officer made the General Article available to the court was –abject silence on the question of proof. There is no other way to characterize the conduct of the law officer than to state that he simply assumed that evidence demonstrating prejudice to good order and discipline and discredit to the armed forces was in the record and of sufficient weight to permit the Court to find guilt.

What was this evidence? There was not a word of evidence that went to any point in this case except the physical conduct of the defendant. The impact of the law officer's conduct was an *assumption* that all of this testimony went also to the issues of whether this conduct was prejudicial to good order and discipline and discrediting to the service.

(a) *The Court of Claims formulation*

The Court of Claims finds evidentiary support for guilt under the General Article in the following:

> "The answer is that the Court of Military Appeals was certainly not out of bounds when in effect it held that (a) as charged here, the crime acquitted sodomy, in and of itself, necessarily embodied those same elements, and (b) that in this case the court-martial could find those same elements, with respect to the lewd and lascivious conduct, from the nature of the acts and circumstances themselves, it being unnecessary to have extraneous or independent proof of those factors." (slip opinion, p. 7)

To begin with, neither the Court of Military Appeals nor the Court of Claims could base guilt of any kind of any *accusation* of sodomy which resulted in an acquittal.

More importantly, military use of the general article clearly requires proof under the two explicitly stated requirements of the statute, beyond that of the physical conduct alone. The statute proscribes only conduct that is "to the prejudice of good order and discipline in the armed forces" or "of a nature to bring discredit upon the armed forces." The statute says nothing of "lewd and lascivious conduct." If the statutory phrases are not to be written out of the statute by a parade of military prosecutions aimed at reducing this statutory language to pure surplusage, more than physical conduct must be shown. Some form of nexus between that conduct and good order, discipline, or the repute of the service is part of the burden of the prosectuion.

And so hold the military authorities, themselves:

(b) *The military formulation*

Aware of the legal warts appearing on the surface of the General Article in contemporary jurisprudence, military

tribunals have taken pains to point out that some nexus between the defendant's conduct and the controversial clauses of the General Article must be made out by the prosecution:

> ". . . The General Article is not such a catch-all as to make every irregular, mischievous, or improper act a court-martial offense. Rather, as this Court stated in *United States v. Holiday*, 4 U.S.C.M.A. 454, 16 C.M.R. 28:
>
> ". . . . The Article contemplates only the punishment of that type of misconduct which is directly and palpably – as distinguished from indirectly and remotely – prejudicial to good order and discipline." *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 564-565 (1964).

If a direct and palpable connection between conduct and good order and discipline must be shown, some one must show it; to do so, evidence of some kind must be offered by the prosecution probative of this direct relationship. The Manual of Courts Martial repeats this requirement:

> "An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the Article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable." (Para. 213a, Manual for Courts Martial (1951))

No law officer may, therefore, properly make the simple assumption that the "disorder or neglect", (viz., the physical

conduct involved) ipso facto and necessarily violates Section 134. The *prejudice to good order and discipline*, as well as the *discredit* to the armed forces must be *proved*.

Moreover, the Manual enumerates the separate elements of proof under Section 134 that form the burden of the prosecution:

> "Para. 213d. The proof required for conviction of an offense under Article 134 depends on the nature of the misconduct charged . . . One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213(f) and should be included in instructions as to the elements of these offenses, in addition to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:
>
> (1) That the accused did or failed to do the act, as alleged, *and*
>
> (2) *That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.* (Emphasis supplied.) Manual for Courts Martial, 1968, pp. 28-73.

These directions in the Manual make it quite clear that proof of the impact of defendant's conduct on order and

discipline (or on the public repute of the service) is separate from proof of the opprobrious conduct itself. The bootstrapping of proof in *Augenblick* into sufficiency for conviction under the general article becomes even more dramatic when another singular aspect of this case is recalled: when proof of physical activity was being put into the *Augenblick* record the defendant was not charged with conduct bearing in any way on discipline, order, or the reputation of the Navy. None of these elements are present in Section 125.

The Court of Claims would tell us, however, that (1) after the Manual informed Augenblick (and all other servicemen) in 1961 that, if and when he was charged with sodomy, no other "lesser included crime" could be proved simultaneously against him, and (2) after a trial in which not one word of evidence supporting Section 134's special elements was put into the record by the prosecution, – that this defendant was nonetheless "free to introduce"[12a] evidence of his own under the general article. He certainly was. But if he did, he ran as strong a chance in 1961 of having the evidence excluded as beyond the issues in the case[13] as he did of helping himself. And if that is so, notice, proof and due process become moves in a game rather than guarantees of basic fairness.

Picture the situation of a defendant "free to introduce" evidence under Section 134 when no charge under that statute, no specification under that statute, and no proof under that statute had surfaced against him. There were no less than 58 different specifications under the general article in 1961, ranging from "abusing a public animal" to

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[12a] Slip opinion, p. 8.

[13] Since this evidence is wholly immaterial in a prosecution under Section 125.

"breaking a medical quarantine". Among these, there are at least three which can, conceivably, cover sexual activity. The Court of Claims would require this defendant to canvass the entire record for any and all evidence of each of the 58 different possible specifications, and then, on his own initiative (again in a 180-degree reversal of where this burden should fall) *sua sponte* offer exculpatory evidence on any conceivable specification that the proof had strayed into. And this without a charge or specification to tell him what the prosecution really had in mind. The military defendant cannot constitutionally be put under that burden.

(c) *The cases in the Court of Military Appeals*

The earlier cases in the Court of Military Appeals in which Section 125 *was* held to include Section 134 do not cure the constitutional problems herein. These cases hold, rightly or wrongly (and none contains any reference to the constitutional problems involved) that certain forms of sexual aberration did, under the various circumstances of those cases, rise to the level of a violation of Section 134. But how can any serviceman guess that one form of un-sodomy or near-sodomy within the unnumbered variations of sexual behavior *necessarily* constitutes a violation of the general article because another variant, under different circumstances, was held to violate the statute years before? He simply cannot. Again, the certitude on which notice and, therefore, the constitutionality of the "lesser included" crime must rest, is missing here. That is, unless all sexual irregularities violate Section 134. But the Manual's strictures on proof make it clear that the military prosecutors, themselves, reject that notion.

(d) *What happened in Augenblick*

The mischief in permitting this is compounded by the special facts in *Augenblick*. If the prosecution offered

not a shred of evidence going to these points, the *Defense*, certainly, had no opportunity whatsoever to demonstrate that this defendant's conduct (even if he had performed the "lesser included" lewd and lascivious" act) was private in nature, did not bear on discipline or good order at the time or in this officer's reasonably foreseeable future, and had consequences sufficiently cloistered to preclude any substantial public opprobrium from falling on his service. Yet that is the exercise in proof that the Article and the Manual for Courts Martial require of the prosecution and permit of the Defense.

All evidence was in and the record closed. Thereupon the law officer proceeded to ignore the requirements of proof incumbent on the prosecution on two elements of the charge newly before him. He ignored the manifest inequity of foreclosing defense evidence on these elements. He assumed sufficiency of proof of impact on discipline and order, he assumed sufficiency of proof on discredit, he proceeded oblivious of defendant's right of proof on these same points – and authorized the Court to return a conviction under Section 134. This was the first mention of the General Article in the entire prosecution of this offense.

(3) *Vagueness*

We accept the Court of Claims statement of the holding in *Levy* and *Avrech*:

> "In *Parker v. Levy, supra* and *Secretary of the Navy v. Avrech, supra*, the Supreme Court held that Article 134 of the Uniform Code of Military Justice . . . (the so-called "General Article"), is not unconstitutionally vague under the Due Process clause of the Fifth Amendment where the accused has fair notice that his con-

> duct is punishable under that provision, nor is the article facially invalid because of overbreadth."[13a]

None of these points is being argued here. Vagueness in *Augenblick* is a quite different problem: the vagueness of the instruction given to the Court when it was authorized by the law officer to return a conviction under the General Article. That instruction was:

> "If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airmen third class, United States Air Force but which act fell short of sodomy; and, two, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of the nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code." (R VII-369)

The Court then retired, recalled the law officer to report an acquittal of sodomy but a finding of guilt on the lesser included charge. The law officer then assisted the Court in drafting a specification on this charge, which the Court completed and returned. The Court made no findings, comments or reference to Section 134, except to find guilt under it.

[13a] Slip opinion, p. 4.

If this Court is to believe the directions of the Manual for Courts Martial that guilt under the General Article must be proved by a direct and palpable connection between physical conduct and good order, discipline (or discredit to the service) the Augenblick court martial should have been instructed in those terms. If there are separate elements of proof for which the prosecution had the burden of under Section 134, proof of physical conduct being the first, and proof of impact on good order, discipline or service discredit being the second, a court martial such as Augenblick's should have been instructed in those terms.

It was not. The court was simply given a "specification" drawn from the 58 found in the Manual under Section 134 ("an indecent, lewd and lascivious act") provided with three words of direction ("under the circumstances") and then read the language of the General Article. This instruction was far too vague to provide the objective standard by which all criminal courts, military or civilian, must measure guilt.

Levy and *Avrech* may well have put servicemen on notice that certain forms of conduct are criminal. But neither holding went the considerable additional distance to hold that a simple reading of the general article provided a sufficiently precise and objective standard by which any court (military or civilian) could measure guilt.[14] Neither military custom nor "an actual knowledge of experience

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[14] See Scott, Constitutional Limitations on Substantive Criminal Law, 29 Rocky Mt.L.Rev. 275 (1957), *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937), among the dozen of contemporary decisions invalidating criminal statutes lacking objective standards for determining guilt; e.g., "Any attempt, by persuasion otherwise to induce others to join in any combined resistance to the lawful authority of the state" (*Herndom, supra*, with the

of military law" can constitutionally be substituted for a yardstick found outside the whims and predilections of the judges themselves.

Yet private whim and predilection was the measuring rod for guilt in *Augenblick*. This was so because the General Article's terms have never, in the history of military law, been reduced to objective terms. In consequence, seven judges sitting on a court martial in 1961 were forced to speculate as to what would prejudice good order and discipline since that phrase is without judicial or lay definition. One may search the literature of military reports in vain; the concept has no written metes or bounds. It is totally within the mind of the individual enforcer of order and discipline, and therefore infinitely variable.

Can words more capable of an infinity of private definition be found? Can words more given to one meaning in the mores of 1949 and another in the society of 1971, be found? Regional predilections and prejudices, personal distates either normal or neurotic, private encounters wholly unrelated to military experience, are all set in motion if a man's judgment is to be made guided only by those words. To say they are subjective words is to describe them most moderately. They are more than subjective: they are invitations to the free exercise of whatever private bias the judgment-maker feels most strongly. They are the sole place in the law, civilian or military, when personal whim, caprice and prejudice are beckoned openly to dispose of the essence of a human life.

Court noting the infinite array of cause and effect relationship covered by the prohibition, holding that "The Law, as thus construed, licenses the jury to create its own standard in each case"); being "known to be a member of any gang consisting of two or more persons" (*Lanzetta, supra*); a ban on films deemed to be "of such character as to be prejudicial to the best interests of the people" (*Gelling v. Texas*, 343 U.S. 960 (1925).

(4) *Conclusion*

The Navy used Section 134 in this case to rid itself of Commander Augenblick and disgrace him when more orderly means seemed to fail. The private morality poll conducted by the seven members of the Navy court was light years removed from due process as it is today.

This is not to say that the General Article cannot be used properly by the military authorities. If it is charged in the first instance if its elements are proved by probative evidence, and if the Court is given some practical definitions of its terms, a definition that will, with objectivity, place certain conduct within the Article and other conduct beyond it, the General Article can certainly go on in its place in military justice. But none of these things were done in this case.

II. THE RECORD AS A WHOLE IN *AUGENBLICK* REFLECTS BASIC UNFAIRNESS: THIS COURT SHOULD REVIEW IT EITHER UNDER *O'CALLAHAN* OR ON INDEPENDENT GROUNDS;

The specific constitutional problem of the last minute interjection of Section 134 as a "lesser included crime" within Section 125 is just one part of the strange story of the Augenblick court martial. Beginning with the violations of this officer's rights under the Jencks Act, involving next the conviction under Section 134 when it was never charged, proceeding to the curious re-evaluation of evidence by the Navy Board of Review, and finally to the open off-the-bench campaigning against this officer by the judges of the Court of Military Appeals, this prosecution took the form of vigilantism from the day this officer was charged until the day his final appeal was rejected by his adversaries sitting on the Court of Military Appeals.

We ask the Supreme Court to review this record to determine if, in fact, the totality of these errors do not constitute an abandonment of due process. If this is so. as we submit it is, it makes no difference under what formulation the Court wishes to conduct its review. Review can proceed on the basis that basic fairness and objectivity in fact-finding was absent here, permitting a retroactive application of the jurisdictional rule of *O'Callahan.* Or this Court may simply say that the total record of this prosecution requires scrutiny by it to determine if constitutional injury was suffered by this military defendant, thereby avoiding the niceties of "service-connection" under *O'Callahan* and going straight to the heart of the constitutional lapses in *Augenblick.*

To recount these lapses:

(A) *The Jencks Act violations and the Arrangement with Hodges*

Viewing the Jencks Act facts (*supra,* p. 7), it is important to note that the following conclusions, drawn from these facts by the Court of Claims, remain untouched:

(1) "The first is that Hodges was the all-important prosecution witness." *Augenblick v. United States,* 377 F.2d at 605

(2) "Since Hodges during the trial apparently expected to receive an honorable discharge and subsequent to the Plaintiff's conviction was in fact honorably discharged from the Service, it was also very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session." *(ibid)*

(3) "He" (the defendant) "was denied a necessary step toward obtaining, or discovering, the sta-

tus of, materials or first-rank for his defense." 377 F.2d at 606.

Regardless of whether Jencks Act rights are tantamount to, or approximate constitutional guarantees in this case or any other, the facts cited by this Court in its opinion remain as true today as they were when this case was first decided. What the quoted facts do reflect is another manifestation of the basic unfairness meted out to the defendant at a key point in his defense.

(B) *Section 134 as a "lesser included crime"*

The manifest unfairness of the interjection of the General Article at the close of trial was discussed in Section I of this Petition.

(C) *The Board of Review*

Put simply, the Board of Review sifted the evidence in the case and determined that of the two "specifications" under 134 that were conceivably "lesser" and "included" within Section 125, the much "lesser" specification "disorderly conduct" was not supported by the record while the far more punitive specification "lewd and lascivious conduct" was. Since neither was charged and since no evidence under either specification was offered at court martial, the Board was engaged in an exercise of finding distinctions where none existed in the record.

(D) *The extracurricular activity of the Judges of the Court of Military Appeals*

The next level of Navy justice was the Court of Military Appeals. As noted, its first action in the case was to deny without opinion, Commander Augenblick's Petition for Review.

But the military court's intervention into this matter did not end there by any means. It persisted in a singular manner at a time when the case was not before it and following this Court's decision (on May 12, 1967) in favor of Commander Augenblick. The Court of Military Appeals, acting entirely extrajudicially, took affirmative and strenuous steps to urge the Department of Justice to take this case to the Supreme Court and have it reviewed and reversed. It is a rather illuminating chronicle of judicial pressure brought to bear on an adversary so recently before it and, unfortunately (for Commander Augenblick) on an adversary who was to reappear before that Court again in this same case.

This chronicle of extrajudicial activity by members of this Court is delineated in the Appendix to this Brief. The Appendix is taken in its entirety from the public records of the Augenblick case on file in the Court of Military Appeals. The record of this tale begins on May 23, 1967, 11 days after this Court's decision in Augenblick. The Clerk of the Court reports on that date that:

> "Chief Judge Quinn, after reading the Court of Claims decision in the Augenblick case, decided on May 12, 1967, was disturbed to see the latter Court in effect overrule the decision of this Court. He stated a hope that the Navy Department would seek to have the Supreme Court entertain an appeal in the instant case". (Appendix, p. 2)

Not strangely, Chief Judge Quinn's hope was Mr. Proulx's (the Clerk of the Court) mandate for action:

> "In that regard, I contacted today Admiral Hearn, the Judge Advocate General of the Navy. The Admiral, having just returned from a European trip was not familiar with the decision. As soon as he has a chance to read it and discuss

> it among his staff members, I asked him if he would let me know his reaction." (Appendix, p. 2)

That same day, as the memorandum records, Mr. Proulx contacted the Department of Justice, heard its predictable reaction to this Court's opinion. He reported that the Department expressed a hope that "the Navy Department will come forward with a strong memorandum to the Department of Justice to have it taken up to the Supreme Court". The Clerk was also briefed on a probable procedural course to be followed by Justice.

Four days later (May 31, 1967) Mr. Proulx records a conversation with the Navy's Director of Military Justice – the latter reporting that the General Counsel of the Defense Department was to be requested "to carry the ball" in this matter – the "ball" being the *Augenblick* decision whose determination in favor of the Defendant-officer had precipitated the curious maneuvering of the military court. Proulx told the Navy's Director of Military Justice:

> "I told him I would express to Mr. Warnke, the General Counsel, the *Court's vital interest in the appeal."* (Emphasis Supplied) (Appendix, p. 3)

That the Court was indeed "vitally interested" is quite clear from Mr. Proulx's report of the following day's conversation with Mr. Paul Warnke, General Counsel of the Department of Defense. The Court's interest was quite specific:

> "*On behalf of the Court,* I sought his support to have the Department of Justice, in particular, the Solicitor General, appeal this decision to the Supreme Court . . . I impressed on him

> that if the Court of Claims decision were to stand, then the door was open for allcourt-martial convictions, passed on by this Court, to be appealed from this Court to the Court of Claims". (Emphasis Supplied) (Appendix, p. 4)

There is just enough irony in Mr. Warnke's reported response to make it quite clear that he fully understood the spectacle before him, with all of its ramifications:

> "He" (Mr. Warnke) "felt that if the reference that I called his attention to, that the Court of Claims as a constitutional court could review decisions of this Court despite Article 76 of the Uniform Code of Military Appeals binding on all courts, agencies, etc., should probably furnish the wedge to have the Congress give this Court its much needed stature of life tenure, something which we have been asking since the Court's establishment".

Perhaps this point was driven home to the General Counsel by the conduct he was observing; more graphic evidence that the military court was not a constitutional court cannot be imagined. This exchange (the Proulx-Warnke conversation) was then "reported this date to Judge Kilday and will be reported to Chief Judge Quinn tomorrow over the phone".

Ten months later, Mr. Proulx was able to report results. His March 6, 1968 memorandum of conversation with Mr. Leonard Niederlehner of the Department of Defense discloses that:

> "While in his office we discussed the *Augenblick* case and upon making a call to the Department

> of Justice, Mr. Charles Munnecke, we learned that on that very morning the petition for certeriorari in the case had been filed by the Solicitor General with the Supreme Court." (Appendix, p. 11)

Nonetheless, the Court stayed close to its mission. The Solicitor General's letter to Chief Judge Quinn of May 20, 1968 noted the most recent contribution of the Chief Judge to the cause:

> "Thank you very much for your kindness in sending me, so promptly, the opinion in *Davis v. Clifford*, decided by the Court of Appeals for the First Circuit on April 25, 1968."
>
> "I had not previously heard of this decision. I have already passed it on to the man who is working on the *Augenblick* case." (Appendix, p. 13)

Following all of this, the very same Court again took jurisdiction of the *Augenblick* case and rendered a judicial opinion. In February, 1970, Augenblick petitioned the Court of Military Appeals to reconsider its earlier action rejecting Augenblick's Petition for Review, basing the request for reconsideration on the then-recently announced *O'Callahan* decision. Without any hesitancy the court which had engaged recently in a lobbying campaign against Augenblock within the various governmental legal offices (seeking reversal of this Court's decision in his favor) proceeded to consider this Petition and, most predictably, voted to reject the Petition for reconsideration.[15]

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[15] The vote was 2-1, with Judge Ferguson dissenging. Chief Judge Quinn who played a principal role in the Court's lobbying was on the Court during this reconsideration and voted against Augenblick on each point.

These events unfold an unedifying spectacle. Attempts by members of a court to influence a litigant before it to appeal a decision reversing that court is a disturbing matter itself. This conduct is comparable to a case of a federal district judge openly exerting pressure on the government to appeal from a court of appeals reversal of his trial decision. It is submitted that this would be unseemly judicial conduct.

But when the Government – in the form of the military establishment – is before the Court as its only litigant on a continuing basis, extracurricular pressure by judges is especially conducive to other pressures which do not ennoble the administration of justice. The direct influence of the Court of Military Appeals should not be part of the determination by the Department of Navy to urge, nor the determination of the Department of Justice to embark, on a Supreme Court review of any case. Both departments have other business before the Court of Military Appeals. One of the considerations for the Government to weigh in deciding whether to appeal a case (when so urged by the Court of Military Appeals) becomes the treatment it can expect from that Court in other cases before it. This is an unfortunate intervention of judicial politics where it does not belong.

Far more disturbing are two other facets of these judicial peregrinations. The first is the clubby, parochial interplay between judges of the Court of Military Appeals, the court's clerk as their agent, and the legal officers of the military establishment. With this modus operandi, it is chilling to contemplate the possibilities of understandings and exchanges of information which do not reach the public files. This closeness between a constant litigant before a court and its judges is not the judicial conduct found in Article III courts.

The second is the willingness of judges of the Court of Military Appeals to hear and decide this case after strenuous extrajudicial efforts against a litigant before the Court. It is precisely as if that same District Court judge, after securing Supreme Court review of his reversal on appeal, blithely proceeded to sit on the remand ordered by the High Court. Before October 1970, the Court of Military Appeals had, itself, become Commander Augenblick's adversary. Thereafter it should not have sat in judgment on him.

Viewed in any light, this is fundamentally unfair. Viewed in any light it entirely vitiates the precision with which judges who participated in this off-the-bench activity were able to administer their appellate functions.

This was not an isolated episode in the Augenblick case. On the contrary, it was typical of the Augenblick case. We said it once and we say it again with full force. The *Augenblick* case was an example of very bad naval justice.

The Court of Claims is correct that *Gosa v. Mayden,* 413 U.S. 665 (1973) does not *require* retroactive application of *O'Callahan v. Parker.* Neither does it preclude it. *Gosa v. Mayden* provides ample latitude for applying the constitutional safeguards of a civilian trial to military defendants where the processes of military justice depart so markedly from objective fact-finding and basic fairness as they did – at each level of military justice – in *Augenblick.* A civilian trial would not carry with it the generations of Navy lore that renders a sailor accused of sexual aberration a pariah well before the court martial convenes.

Gosa v. Mayden further permits a case-by-case determination as to whether O'Callahan should be applied retroactively. It is submitted that this Court's scrutiny of

Augenblick on its merits will demonstrate that the constitutional safegaurd of a civilian trial is particularly justified in this case where the Navy prosecution left nothing undone, within or without the rules, to pin guilt – any kind of guilt – on this officer.

In a broader sense this Court, it is submitted, should review the record of this prosecution beyond the strictures of *O'Callahan.* If servicemen are to be protected from the abuses suffered in this case, this Court must label these practices for what they are in terms unmistakeably clear. The use of Section 134 and the antics of the Court of Military Appeals in this case are each flagrant departures from constitutional norms. But they are not alone in this case. The totality of what occurred justified and requires review by this Court so that future military prosecutions will never attempt what happend in *Augenblick.*

(e) *Conclusion*

The thrust of this section has been to point up departures from fundamental fairness and justice which occurred in the military prosecution of an officer accused of sexually deviant conduct. At trial before the Navy court this defendant suffered injustices, indeed, his conviction itself was a consummate exercise of the Navy's ability to snatch the result it wished out of a finding of fact adverse to it. The treatment of the Board of Review was no better; it split non-existent evidentiary hairs to reach a desired result. Finally, there is the activity of the Court of Military Appeals. We make no further comment on its role in this case. The record speaks eloquently for itself.

For the reasons set forth hereinabove, Petitioner prays the Court to enter a writ of certiorari, accepting this cause for review on the issues set forth in this Petition.

JOSEPH H. SHARLITT
Counsel to Richard G. Augenblick

APPENDIX A

May 23, 1967

MEMORANDUM FOR FILE

SUBJECT: United States v. CDR RICHARD G. AUGENBLICK
Docket No. 16,465

Chief Judge Quinn, after reading the Court of Claims decision in the AUGENBLICK case, decided on May 12, 1967, was disturbed to see the latter Court in effect overrule the decision of this Court. He stated a hope that the Navy Department would seek to have the Supreme Court entertain an appeal in the instant case. In that regard, I contacted today Admiral Hearn, the Judge Advocate General of the Navy. The Admiral, having just returned from a European trip, was not familiar with the decision. As soon as he has a chance to read it and discuss it among his staff members, I asked him if he would let me know of his reaction.

I then called Mr. Charles Munnecke, a lawyer in the Department of Justice, who is in the Court of Claims Section. While he normally is assigned military justice cases, he did not argue this particular one. He is very much disturbed by the opinion and hopes that the Navy Department will come forward with a strong memorandum to the Department of Justice to have it taken up to the Supreme Court. He tells me that the normal time runs 90 days to petition the Supreme Court for certiorari and feels that this may be extended in this particular case if a motion for reconsideration is filed with the Court of Claims within the next 30 days. He informs me that the author judge of the opinion, Judge Oscar Davis, was formerly Assistant

Solicitor General in the Department of Justice and it appears that he is the author of probably all of the opinions involving constitutional issues.

After checking with the Chief Judge, I arranged to have Mr. Munnecke meet with him on Thursday in the Chief Judge's office at 4:00 p.m.

ALFRED C. PROULX

ACP:vbs

MEMORANDUM FOR FILE

SUBJECT: AUGENBLICK v. United States (Court of Claims)

Captain Joe Ross, the Director of Military Justice in Navy JAG's Office (Ext. 44906), at the request of Admiral Hearn, called to let us know that the Navy is very much interested in seeing to it that the Solicitor General appeals the *Augenblick* opinion to the Supreme Court. He is seeking the aid of the other services in this endeavor and will request the General Counsel of the Department of Defense to carry the ball in this matter. I told him that I would express to Mr. Warnke, the General Counsel, the Court's vital interest in the appeal.

May 31, 1967

On the occasion of my visit to the Office of Mr. Paul Warnke, the General Counsel of the Department of Defense, to take up the matter of the Court building by the D.C. Government (see letter of May 31st in Court Building file), I left with him a copy of the *Augenblick* decision.

On behalf of the Court, I sought his support to have the Department of Justice, in particular, the Solicitor General, appeal this decision to the Supreme Court. I told him that the Navy was vitally interested in doing this very thing and is seeking the support of the other services, since it is a problem that runs right across the field of military justice. The request for an appeal would, undoubtedly, land on Mr. Warnke's desk in the near future, although as of this date, he was unaware of the decision. I impressed on him that if the Court of Claims decision were to stand, then the door was open for all court-martial convictions, passed on by this Court, to be appealed from this Court to the Court of Claims. He felt that if the reference that I called his attenntion to, that the Court of Claims as a constitutional court could review decisions of this Court despite Article 76 of the Uniform Code of Military Justice making decisions of the United States Court of Military Appeals binding on all courts, agencies, etc., should probably furnish the wedge to have the Congress give this Court its much needed statute of life tenure, something which we have been asking since the Court's establishment.

June 1, 1967

The above was reported this date to Judge Kilday and will be reported to Chief Judge Quinn tomorrow over the phone.

/s/ A C P
ALFRED C. PROULX

ACP:vbs

DRAFT

Honorable Joseph D. Tydings
Chairman, Subcommittee on Improvements
in Judicial Machinery
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of February 29th concerning S. 1704, a bill to authorize the Court of Claims to implement its judgments for compensation.

We do not plan to have a representative of this Department appear before the Subcommittee at the hearing scheduled for March 12th, but submit the following comments and a proposed amendment for the Subcommittee's consideration.

S.1704 would give the Court of Claims power to issue such orders and grant such relief as the District Courts may issue and grant in civil cases over which they have original jurisdiction. This remedial authority may include the authority to restore to military status persons who have lost such status as a result of either court-martial or administrative action and to order reinstatement in security positions of those individuals who are deemed by the Court to have been improperly separated. The possible ramifications of action by the Court of Claims in these two areas are a matter of significant concern to the Department of Defense.

The traditional rule that court-martial convictions are exempt from direct review by the civil courts was by inference recently reaffirmed by the refusal of the U.S.

Supreme Court to grant certiorari in a decision by the Court of Military Appeals. *United States v. Crawford,* 380 U.S. 970 (1965). Collateral review has been limited to the issue of whether a court-martial has jurisdiction (i.e., whether it was properly constituted, had jurisdiction of the person and subject matter, and power to impose the sentence). In *Burns v. Wilson,* 346 U.S. 137 (1953), the Supreme Court interpreted jurisdiction, for civil court review purposes, as including the traditional aspects of jurisdiction plus a determination of whether an accused's allegations relating to constitutional gurantees had received full and fair consideration in the military judicial system. The Federal District and Circuit Courts have adhered to this standard. Likewise in the review of administrative actions these Courts have confined themselves to the administrative record.

However, the Court of Claims has gone far beyond the other federal courts in its collateral review of court-martial proceedings. Thus it has not hestitated to inquire into allegations of procedural errors, to go outside the record and to question the exercise of professional discretion by law officers. In *Augenblick v. United States,* 377 F.2d 586 (1967), the Court of Claims refused to regard as final a court-martial conviction because it disbelieved the testimony of a prosecution witness and thought the rulings of the law officer constituted an abuse of discretion. In *Juhl v. United States,* Ct. Cl. No. 353-65 (1967), the Court of Claims held a court-martial conviction invalid by going outside the record to consider out-of-court statements that conflicted with testimony introduced at the trial. Similarly in reviewing administrative proceedings the Court of Claims often conducts a trial do novo rather than confining itself to the administrative record. See, for example, *Beckham v. United States,* Ct. Cl. 379-61 (1967).

In view of this propensity of the Court of Claims to accord an extremely broad review of both court-martial convictions and administrative actions that substantially exceeds the limitations observed by the other federal courts, it is our view that the additional authority lost such status through court-martial
authority to reinstate where security is involved.

The most pernicious aspect of granting the remedial authority contemplated by the bill without any limitation as to its applicability to court-martial proceedings is that such a grant would tend to place the Court of Claims in conflict with the Court of Military Appeals, a three-judge civilian tribunal at the approximate judicial level of the Circuit Courts of Appeal, whose effectiveness has been cited by the present Chief Justice of the U.S. Supreme Court in an article published in a legal periodical in 1962.

> "The [Uniform] Code [of Military Justice] represents a diligent effort by Congress to insure that military justice is administered in accord with the demands of due process. Attesting to its success is the fact that since 1951 the number of habeas corpus petitions alleging a lack of fairness in courts-martial has been quite insubstantial. Moreover, I know of no case since the adoption of the Code in which a civil court has issued the writ on the basis of such a claim. This development is undoubtedly due in good part to the supervision of military justice by the Court of Military Appeals." (37 N.Y.U. Law Review 181, 188-89)

Further, any attempt to grant judicial authority to permit the courts to restore individuals to military status or, *a fortiori*, to command would raise grave constitutional

issues with respect to the powers of the President as Commander-in-Chief of the armed forces.

Accordingly, we recommend that the following proviso be added at the end of section 1 of the bill.

> "Provided, that nothing contained herein shall be construed to authorize the Court of Claims to restore or order restored military status to any person removed from such status pursuant to sentence of a court-martial or by administrative action under regulations duly prescribed by the Secretary of Defense or a Secretary of a military department; or to order a person reinstated in a position determined by the President or by the head of an executive agency or military department to be a position requiring knowledge affecting the security of the United States."

If the bill is so modified, the Department of Defense has no objection to its enactment.

The Bureau of the Budget has concurred in the submission of this response to your inquiry.

SY

LN

March 6, 1968

MEMORANDUM FOR FILE

SUBJECT: Bill S. 1704

Mr. Leonard Niederlehner reached me while I was on temporary active duty with the Navy and asked if I could get away to visit his office before the end of the day to

discuss the stand of the Department of Defense regarding S. 1704. This bill would enlarge the jurisdiction of the Court of Claims to go beyond money judgments and direct the Secretaries of the military departments to restore men to duty – something to date they have not been able to accomplish.

I went to the Pentagon to Mr. Niederlehner's office and he gave me a copy of S. 1704 and asked me to read the attached draft of a letter which he plans to forward to Senator Tydings, the Chairman of the Subcommittee considering S. 1704. Hearings on this bill are due to begin Tuesday, March 12th. After reading the draft, I told him I could speak for the Court and state that the position taken would be one that would receive the full backing and sympathy of the Judges of the Court.

While in his office we discussed the *Augenblick* case and upon making a call to the Department of Justice, Mr. Charles Munnecke, we learned on that very morning the petition for certiorari in the case had been filed by the Solicitor General with the Supreme Court.

ALFRED C. PROULX

ACP:vbs
File: Augenblick

May 20, 1968

Hon. Robert E. Quinn
United States Court of
Military Appeals
Washington, D.C. 20442

Dear Chief Judge Quinn,

Thank you very much for your kindness in sending me so promptly, the opinion in *Davies v. Clifford*, decided by

the Court of Appeals for the First Circuit on April 25, 1968.

I had not previously heard of this decision. I have already passed it on to the man who is working on the *Augenblick* case.

It was a great pleasure to see you at the First Circuit Judicial Conference at Newport last week.

With best wishes,

Cordially yours,

/s/ Erwin N. Griswold
Erwin N. Griswold
Solicitor General

August 13, 1968

MEMORANDUM FOR FILE

SUBJECT: S. 1704

Judge Kilday, who had been given a xerox copy of the memorandum received from Lt. Colonel James Taylor, Jr., USAF, Congressional Legislation Division, Office of Legislative Liaison, regarding S. 1704, called me to his office to discuss its contents. At the meeting were Bill Sandweg and Mike Katen.

I recalled to the Judge that I had mentioned to him about my visit to see the Acting General Counsel Leonard Niederlehner, who wanted to apprise me of the letter that he was writing to Senator Tydings opposing the granting of this additional power to the Court of Claims. The Judge stated that he did not remember it specifically but

was now concerned as to the status of this legislation which passed the Senate a short while ago. I told him that I would contact Bill Foley, the counsel for the House Judiciary Committee, and report back to him before he leaves for his trip on Thursday.

When I called Bill Foley, I was informed that he had recently retired as of June 30th and was also told that the bill had been referred to Subcommittee 2 and in the immediate hands of the counsel, Bill Shattuck (Code 180 X5741). In talking to Bill, he seemed to be well versed with the bill itself and also was not surprised in our interest here at the Court in the light of the *Augenblick* case. In response to my question, he stated that he did not believe that this particular bill would get through the House when the Congress reconvenes after Labor Day. He noted in particular that the letter that the Department of Defense sent to Tydings had not been included in the Senate Report. Accordingly, he had requested the Defense Department to make its views known to the House Judiciary Committee, knowing in advance that a similar letter opposing the bill will be sent to the same committee. He also noted that the Court of Claims would have little difficulty receiving the Judicial Conference approval of this bill since, in effect, it amounts to saying that they could wrap up in one package the payment of back pay plus the relief that today must be sought in the Federal District Court. However, the grant of power is so broad that there is a very good possibility that the Court of Claims would not stop at the point now reached by the District Court – namely, short of ordering the Departments of the Army, Navy and Air Force from restoring someone to duty. Therefore, this bill will be very carefully scrutinized on his recommendation by the members of the House Judiciary Committee and, as I stated above, with a very good

possibility that it will be a dead issue at least for this Congress if no action is taken upon the return of Congress.

Mr. Shattuck agreed to keep me informed of any and all developments.

August 14, 1968

The above was reported to Judge Kilday this date. The Judge informed me that Mr. Shattuck was well known to him and, as a matter of fact, had considered bringing him to the Court when he was appointed as a Judge, as his principal staff assistant.

ALFRED C. PROULX

ACP:vbs

APPENDIX B

In the United States Court of Claims

No. 357—64

(Decided January 22, 1975)

RICHARD G. AUGENBLICK v. THE UNITED STATES

Joseph H. Sharlitt, attorney of record, for plaintiff. *Neal E. Krucoff* and *Lemuel R. Green*, of counsel.

Bruno A. Ristau, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before LARAMORE, *Senior Judge*, DAVIS and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED PETITION AND FOR RELIEF FROM JUDGMENT, AND ON DEFENDANT'S MOTION TO LIFT THE STAY OF PROCEEDINGS AND TO DENY FURTHER RELIEF

DAVIS, *Judge*, delivered the opinion of the court:

Our decision in 180 Ct. Cl. 131, 377 F. 2d 586 (1967), invalidating plaintiff's court-martial conviction and dismissal from the Navy, was reversed by the Supreme Court, 393 U.S. 348 (January 14, 1969). On the coming down of that Court's mandate, plaintiff immediately filed here a motion for leave to file a first amended petition. Believing that this proposed amendment raised issues, which, if open to judicial scrutiny should have been presented earlier, or merely stated or restated positions which had been rejected by the high court or were required by its decision to be refused, we denied (on

April 4, 1969), 187 Ct. Cl. 727, the motion for leave to file the first amended petition, and ordered that our previous judgment be vacated and withdrawn and that the petition be dismissed.[1]

On July 14, 1969, plaintiff moved for leave to file a second amended petition and also to set aside our order of April 4, 1969. That motion and the proffered amendment invoked the Supreme Court's intervening ruling in *O'Callahan* v. *Parker*, 395 U.S. 258 (decided June 2, 1969); claiming that Augenblick's offense was not service-connected, plaintiff now asserted that the court-martial was without jurisdiction on that ground. The motion and the amendment also alleged, as a separate basis, that the general article, Article 134, 10 U.S.C. § 934, of the Uniform Code of Military Justice—under which Augenblick was convicted by the court-martial—was invalidly applied to his case. On August 20, 1969, plaintiff also moved for a stay of our order of April 4, 1969. Defendant opposed both applications.

At that time, there were pending before the Supreme Court, or about to be filed, certiorari petitions presenting the issue of the retroactivity of *O'Callahan*. On October 31, 1969, this court ordered that plaintiff's motion for leave to file his second amended petition be held in abeyance pending the Supreme Court's action on those certiorari petitions.[2] That Court did not reach and determine the retroactivity question until it decided *Gosa* v. *Mayden*, 413 U.S. 665, on June 25, 1973, and we suspended ruling in the present case during that period, although we received some further briefing and argument.[3]

Even after *Gosa* v. *Mayden*, the constitutionality of Article 134 still remained an open question, and since that issue was then before the Supreme Court we held this case still further, awaiting an authoritative ruling on that point. The Supreme

[1] Plaintiff sought certiorari from this decision; that petition is still pending in the Supreme Court since the parties agreed that it should await our decision on the second amended petition. 43 U.S.L.W. 3037 (U.S. Aug. 13, 1974).

[2] In the same order we granted a stay of our order of April 4, 1969 (denying the motion for leave to file the first amended petition) until thirty days after our action on the motion for leave to file the second amended petition.

[3] After *Kelfard* v. *Commandant*, 401 U.S. 355 (1971), was decided without reaching *O'Callahan's* retroactivity, defendant moved here to lift the stay order of October 31, 1969 (*see* note 2, *supra*). That motion has not been acted upon and is still pending.

Court sustained the validity of Article 134 in *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, 94 S. Ct. 2547 and *Secretary of the Navy* v. *Avrech*, No. 72-1713, decided July 8, 1974, 94 S. Ct. 3039.

It is now at last appropriate and necessary to act on plaintiff's request to add to his petition the two new issues of the retroactivity of *O'Callahan* and of the validity of the application to his case of Article 134.[4] Defendant urges that, in any event, plaintiff's efforts to raise those questions came too late, but we need not and do not reach that argument since we are persuaded that, on their merits, the two points are foreclosed by the Supreme Court's recent rulings.

I

We think it clear that *Gosa* v. *Mayden*, 413 U.S. 665 (1973), determines authoritatively that the Constitution does not require that the *O'Callahan* rule be applied to court-martial convictions occurring prior to June 2, 1969 (the date *O'Callahan* was decided). Though there was no opinion for the Court, the Court's judgment, taken together with the opinions of Mr. Justice Blackmun (for himself and three other Justices)[5] and Mr. Justice Rehnquist,[6] necessarily add up to that result. The decision was not ad hoc to the *Gosa* case alone. Five justices having voted on general grounds that the *O'Callahan* rule should not be applied to pre-*O'Callahan* cases, the Court was able to render a decision which, unlike a four-to-four affirmance, creates a binding precedent controlling the lower courts in comparable cases. It is immaterial that less than a majority of the Court upheld the legal proposition that *O'Callahan* should not be applied retroactively; the important thing is that a majority voted that *O'Callahan* should not control cases like the present one. *Cf. Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949).

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[4] We had already received briefs on the bearing of *Gosa* v. *Mayden*, and the Article 134 issue. We have also had the benefit of oral argument and some further briefing after *Levy* and *Avrech*.

[5] Holding that *O'Callahan* should not be applied retroactively. 413 U.S. at 685.

[6] Holding that *O'Callahan*, even if required to be applied retroactively if valid, should not be followed but should be overruled because wrongly decided. 413 U.S. at 692.

Plaintiff urges that Mr. Justice Blackmun's opinion would allow retroactivity if it could be shown that the fact-finding in a specific case was particularly unreliable "in direct consequence of a generic disability within military justice" (plaintiff's words),[1] but we do not read the opinion that way. It ends its discussion of the point by saying flatly and without qualification (413 U.S. at 685: "We conclude that the purpose to be served by *O'Callahan*, the reliance on the law as it stood before that decision, and the effect of a holding of retroactivity, all require that *O'Callahan* be accorded prospective application only. We so hold [footnote omitted]." The ruling was across the board.

Gosa v. *Mayden* is sufficient to dispose of plaintiff's claim that he is entitled to the coverage of *O'Callahan* v. *Parker*. The majority of this court, through Judges Laramore and Nichols, holds, in addition, that Augenblick's offense, involving two servicemen in a deviant sexual act, was "service-connected," and therefore that *O'Callahan* would be inapplicable even if it were to be applied retroactively. Judge Davis would not consider this point, since it is unnecessary to do so, and expresses no opinion on the issue of service-connection.

II

In *Parker* v. *Levy*, *supra*, and *Secretary of the Navy* v. *Avrech*, *supra*, the Supreme Court held that Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (the so-called "General Article"), is not unconstitutionally vague under the Due Process Clause of the Fifth Amendment where the accused has fair notice that his conduct is punishable under that provision, nor is the article facially invalid because of overbreadth. 94 S. Ct. at 2562; 94 S. Ct. at 39–40.

Plaintiff denies that these rulings control his case since, unlike Levy and Avrech, he was not initially charged with a violation of Article 134, but that section of the Code came into his trial only after all the evidence had been submitted. The original charge against Augenblick was solely sodomy under Article 125; at the close of the testimony the law officer

[1] Plaintiff asserts that is true in this case and in other military cases of sexual deviation. Brief of Plaintiff at 8–13 (filed Sept. 18, 1973).

instructed the court-martial that commission of an "indecent, lewd and lascivious" act in violation of Article 134 was a lesser-included offense which they could also find under the testimony.[8] The court then found Augenblick not guilty of sodomy (under Article 125) but guilty (under Article 134) of committing an indecent, lewd and lascivious act by wilfully and knowingly placing his head in the enlisted man's lap with his face in close proximity to the latter's exposed privates. *See* 180 Ct. Cl. at 139, 377 F. 2d at 590–91. The question before us is whether this posture of the case compels or permits a disposition other than those in *Levy* and *Avrech*.

At the very least, those decisions of the high court demonstrate that plaintiff could not have complained of vagueness if he had been initially charged with an indecent, lewd and lascivious act under Article 134, and the proof had been the same as here in the actual trial. Augenblick could not reasonably have had any doubt that (a) the acts found by the court-martial were indecent, lewd, and lascivious, and (b) indecent, lewd and lascivious acts fell within Article 134. The former goes without saying and needs no elaboration. As for the latter, Appendix 6 of the 1951 Manual for Courts-Martial set forth (at p. 492) under Article 134 a form specification for an indecent, lewd and lascivious act with another (as well as related offenses such as indecent acts with a child, and indecent exposure, at p. 491).

The problem thus narrows to the invocation of Article 134 at the close of the case as a lesser-included offense. Plaintiff

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[8] The law officer instructed as follows:

"If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airman third class, United States Air Force but which act fell short of sodomy; and, two, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of the nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code."

Military law recognizes the notion of lesser-included offenses, and the right of the law officer to instruct on them (even over defense counsel's objection). *See* Art. 79, U.C.M.J., 10 U.S.C. § 879; Manual for Courts-Martial (1951 ed.), pp. 303–04; *United States* v. *Floyd*, 2 U.S.C.M.A. 183, 188, 7 C.M.R. 59, (1953); *United States* v. *Wilson*, 7 U.S.C.M.A., 713, 715, 716–17, 23 C.M.R. 177 (1957); *United States* v. *Bairos*, 18 U.S.C.M.A. 15, 17, 39 C.M.R. 15 (1968).

says he was deprived of due process because he was not on notice that Article 134 might be invoked in that fashion after all the evidence was in, and therefore had no opportunity to present evidence on, or mold his case as to, the elements of the Article 134 offense. This claim of lack of due notice evaporates when one considers the facts of Augenblick's trial. Of the elements of the crime of sodomy the one as to which the proof was weakest was actual penetration. We cannot believe that an officer accused of this type of sodomy would or could think he would go scot-free if actual penetration were not proved beyond a reasonable doubt, but the facts of the occurrence were as found here by the court-martial. Particularly in view of Article 134's specific coverage of indecent and lewd acts, the accused must have known that in those circumstances he could be found guilty of the related, lesser offense of lewd and lascivious conduct. That would be the reasonable expectation, borne out by prior holdings of the military tribunals that lewd acts under Article 134 could be lesser offenses included in an offense such as sodomy under Article 125 or rape under Article 120. *United States* v. *Jones*, 13 C.M.R. 420, 422 (Army Bd. Rev., 1953); *United States* v. *Headspeth*, 2 U.S.C.M.A. 635, 10 C.M.R. 133 (1953). If plaintiff wished to proffer evidence relating to the lesser crime, he should have known that he had that opportunity. In the constitutional sense—that a defendant must not be convicted of a charge of which he has inadequate notice (*Rabe* v. *Washington*, 405 U.S. 313 (1972); *Cole* v. *Arkansas*, 333 U.S. 196 (1948))—there was here sufficient notice that the offense of indecent, lewd and lascivious conduct under Article 134 could and might well be implicated.

We have discussed the question in terms of fair notice, rather than of the concept of "lesser-included offense," because the former raises a constitutional issue while the latter is, in itself, merely a matter of the proper interpretation of military law. Once it is decided that the constitutionally required due notice has been given, the problem of whether lewd conduct under Article 134 is technically a lesser-included offense under Article 125 no longer rises to the constitutional plane but is, rather, a non-constitutional issue of military law with which the civilian courts cannot normally deal if the military tribunals have fairly considered

the problem. *United States* v. *Augenblick*, 393 U.S. 348 (1969); *McDonald* v. *United States*, Ct. Cl. No. 396–73, decided December 18, 1974; *Artis* v. *United States*, Ct. Cl. No. 247–73, decided December 18, 1974. In this instance the Court of Military Appeals has expressly held that the offense for which plaintiff was convicted was properly found a lesser-included crime under Article 125 (sodomy).[9]

We have no reason to think that this view of the Court of Military Appeals is unreasonable or resulted from a lack of due and fair consideration. Before plaintiff committed his offense, that tribunal had already held, as we have pointed out, that lewd and lascivious conduct under Article 134 could be found as a lesser-included offense of sodomy or rape. As we have also suggested, it seems entirely reasonable and expectable that an incompleted act of sodomy should be treated and punished as a lewd act.

Plaintiff insists, however, that the Article 134 offense, as found here, embodies elements absent in the crime of sodomy, *i.e.* the finding that the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces (see footnote 8, *supra*).[10] Those elements, he says, were not proved or canvassed at the trial which concentrated solely on sodomy. The answer is that the Court of Military Appeals was certainly not out of bounds when in effect it held that (a) as charged here, the crime of sodomy, in and of itself, necessarily embodied those same elements, and (b) that in this case the court-martial could find those same elements, with respect to the lewd and lascivious conduct, from the nature of the acts and circumstances themselves, it being unnecessary to have extraneous or independent proof of those factors. *Cf. United States* v. *Sanchez*, 11 U.S.C.M.A. 216, 217–18, 29 C.M.R. 32 (1960).[11] We repeat that if defense counsel thought he could

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[9] After the Supreme Court's reversal of our original ruling, plaintiff applied to the Court of Military Appeals to reconsider its refusal to hear his case. He raised both the Article 134 point and the contention that *O'Callahan* governed and should be retroactively applied. The Court of Military Appeals rejected both arguments on their merits. 19 U.S.C.M.A. 638 (1970).

[10] This case does not involve the part of Article 134 which refers to "crimes and offenses not capital."

[11] Plaintiff says that this is tantamount to a directed verdict of guilty, but this position is obviously incorrect. The court-martial was permitted, but not required, to find these elements from the proven circumstances. The law officer's charge was to this effect. *See* footnote 8, *supra*.

persuade the court-martial that the conduct here did not embody either of those elements, he was free to introduce evidence to that effect (if he could).[12]

The result is that the second ground of the second amended petition which plaintiff proffers—that Article 134 was unconstitutionally applied to his case—is without merit, along with his claim that *O'Callahan* governs his case.

We hold, for these reasons, that plaintiff's motion for leave to file a second amended petition and for relief from judgment should be denied; that defendant's motion to lift the stay of proceedings and to deny further relief should be granted; and that the order of April 4, 1969, dismissing the petition should go into effect in thirty days.[13]

NICHOLS, *Judge*, concurring:

I concur with and join in Judge Davis's opinion. I would like to say, however, that there was not at any time any need to await a decision whether *O'Callahan* v. *Parker*, 395 U.S. 258 (1969) was retroactive, because it was almost from the first apparent that Commander Augenblick's case was not one of those excluded from the jurisdiction of military tribunals by that authority. Moreover, the cloud over the constitutionality of Art. 134, dissipated in *Parker* v. *Levy*, 417 U.S. 733 (1974); and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974), had not increased to the dimensions of a man's hand during the earlier part of the long delay period. In plaintiff's able brief of September 27, 1971, the vagueness and possible unconstitutionality of Art. 134 was urged, but without the support of the lower Federal court decisions, which later accreted to it. We could have disposed of the *O'Callahan* problem on the grounds presently to be submitted, and of Art. 134 on the cogent reasoning of Judge Davis's opinion.

I

Commander Augenblick was not booked on a felony charge under D.C. law. In *Sharkey* v. *United States*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969), it is held that the

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[12] He was free, of course, to inquire from the law officer, before the evidence closed, whether the latter intended to charge the lesser-included offense.

[13] Our order of October 31, 1969, stayed our order of April 4, 1969, until thirty days after action on the motion for leave to file the second amended petition (*see* footnote 2, *supra*).

O'Callahan doctrine does not deprive the military courts of jurisdiction to try offenses that would be dealt with as petty offenses in the civilian world, not requiring jury trial. I note that on their arrest, Commander Augenblick and his companion were booked for "disorderly conduct". This would dispose of the "service connection" issue at the threshhold, if one were certain how the *Sharkey* doctrine would be applied to the instant case.

By the D.C. Code, § 22–1112, lewd, indecent or obscene acts are misdemeanors punishable, where a minor is not involved, by a fine of not over $300, or not over ninety days imprisonment, or both. They come under the ambit of "disorderly conduct" along with duelling, § 22–1102, and keeping a fierce dog, § 22–1111. This appears to be the nearest counterpart to the Art. 134 specification under which Commander Augenblick was convicted. For sodomy, by D.C. Code § 22–3502, the penalty is $1,000 fine or ten years imprisonment. This corresponds to the Art. 125 charge upon which Commander Augenblick was acquitted. I would guess that if left to civilian prosecution, Commander Augenblick would have been in slight or no jeopardy of ever being charged under § 22–3502. The booked offense, and the one that could have been proved, put him in jeopardy of moderate punishment for which the Constitution does not require indictment or jury trial. See cases cited in *Sharkey*, *supra*. I would, therefore, on authority of *Sharkey*, hold the *O'Callahan* exclusion of military courts from trying felonies committed in the civilian world, inapplicable here.

II

Whether or not the above is accepted as valid, a concerned and principled application of the "service connection" concept requires the finding that such connection existed in this case. An article by an able and knowledgeable member of our bar, Colonel Charles M. Munnecke, *O'Callahan Revisited and Buttoned Up*, Bulletin No. 46, The Judge Advocate Journal, p. 11 (October, 1974), summarizes the decisions of the Court of Military Appeals, the lower Article III courts, and the Supreme Court, on the scope of "service connection". There is, he says, little relevant conflict among them, and the difficulty of determining "service connection" *vel non* has not

been nearly as great as anticipated, save in the area of narcotics violations, which is now before the Supreme Court and may be resolved before our decision appears.

How do you determine "service connection?" The preferred technique since *O'Callahan* has been to look at the facts of *O'Callahan* and those of the case then at bar, to see if significant differences, favoring military jurisdiction, appeared. The military apparently lacked before *O'Callahan* a strong or any conviction that *O'Callahan*'s type of crime had "service connection." The order allowing *certiorari* assumed it had none and the Government briefed and argued on that basis, 393 U.S. 822 (1968). Mr. Justice Harlan, dissenting at 395 U.S. 274 (1969), urged that the military had a strong interest in deterring rape, assault, mayhem and murder by its members upon the local civilian population. This has impressed many persons as true, but it might be answered that interest in deterring an offense and interest in trying it are two different things. The certainty of being consigned to the tender mercies of an enraged civilian population and tried before a jury of the victim's peers, might be a more effective deterrent to commission of crimes of *O'Callahan*'s type, than trial by court-martial and military punishment following. Certainly *O'Callahan*, prospectively applied, does not protect servicemen against possibly harsher treatment than the military would afford, and cannot be so construed. I gather that a military accused cannot even waive a civilian jury and elect a court-martial if he so desires for his own protection. It is no wonder the military leaders are now as complacent as Colonel Munnecke indicates they are, about the situation. I should expect that even now, if needed, there could be a forceful announcement delimiting the scope of "service connection", as seen by the Service heads, and it would if reasonable be entitled to much respect. It would not have to be ignored because of prior contrary court decisons, made by civilian judges on the basis of their own unaided perceptions as to the scope of military necessity. The prevailing silence on the subject may well reflect satisfaction with "service connection" as judicially determined.

Thus "service connection" has been determined up to now by the happenstance circumstances of *O'Callahan's* particular case, and the absence of any other guide as to the scope

of "service connection", plus the failure of the service to define the extent to which denial of the right to try particular offenses will hamper them in performing their missions. Nevertheless, when we have a crime to deal with wholly unlike *O'Callahan's*, it appears to me that instead of a wooden use of the *O'Callahan* circumstances as tests, we should endeavor to ascertain from Service sources a conception of what the denial of their right to try—as distinguished from the desire to deter—may mean. I do not find anything in *Relford* v. *Commandant*, 401 U.S. 355 (1971), that prohibits this.

Statutes and regulations sometimes announce special service interest in offenses of certain types. These must be regarded as stating a "service connection" by implication. In this category I would put the regulations on homosexuals that all three Services now have in force, and have had for many years, back to a time long prior to Commander Augenblick's arrest in 1961. These regulations divide homosexuals into classes I, II and III. (*See* our decision in *Glidden* v. *United States*, 185 Ct. Cl. 515 (1968)). Class I involves offenses where the other party was an unwilling participant, or a minor. The regulations call for these offenses to be tried by court-martial. Class II are other homosexual offenses currently punishable. They may be dealt with by court-martial but more usually by administrative discharge, which may or may not be under honorable conditions. Class III are homosexual offenses committed prior to the current enlistment, and instances of persons with homosexual tendencies but no active involvement. These persons must be got out of the service, though of necessity with honorable discharges.

We may note the stress on just getting rid of the homosexual. Nothing that corresponds to this occurs in civilian justice. The military would unload their undesirables on the civilian world, but the reverse cannot occur. The time when the offender can be required to purge himself by enlisting in the military, has long passed.

I suppose that in civilian society the sovereign people formerly considered they had a right to prohibit and punish by law, behavior they considered infamous, without being required to show the offense had a victim, or in any way

injured the fabric of society. This attitude was the basis of laws against sodomy, bestiality, acts against nature, etc., and continues to be the motive behind their enforcement so far as they are still enforced. The old attitude, however, is eroding, and we now are told that society has no right to punish a victimless crime. Exemptions of "consenting adults" from laws against sodomy, etc.., are frequently urged and sometimes enacted. I suppose a person who urged such exemptions might still, if heterosexual, think twice about making a long journey in company with a person he suspected to be homosexual. There is no real conflict between these two attitudes. Where the laws remain on paper unchanged, lack of zeal and enthusiasm by the civilian police in their enforcement may afford a practical shield to the homosexual in his way of life.

Civilians can choose their companions, but when you join the military you embark on an extended voyage with persons not of your choice. In the Navy, Commander Augenblick's branch, it may be six months under water in a submarine. If persons you regard as undesirables are in the crew, their companionship is foisted upon you. As concerns officers, the Services have the additional problem that those who, by their own acts, cause themselves to be popularly regarded as pariahs, can hardly provide effective leadership. The reasonableness of the popular assignment of pariahship hardly matters.

According to Navy Regulation, 32 C.F.R. § 719.107(c)(2)(iii), 38 Fed. Reg. 5997, March 6, 1973: 39 Fed. Reg. 18436, 719.107(c) May 28, 1974, cases of homosexuality in which mild penalties have been imposed by civilian authorities upon conviction, may still be tried by court-martial. It continues:

> * * * Homosexuality is a more serious problem in the military society because of the close-contact living and working conditions of its members.

According to Everhard, *Problems Involving The Disposition of Homosexuals in the Service*, 2 Air Force Judge Advocate General's Bulletin 20 (Nov. '60) another basic concern of the Services about homosexuals is infection of others: "* * * they must have partners and often prey on the youthful, naive, or greedy." "Cures", psychiatric or otherwise, are

not considered because "it is not primarily a Service responsibility", and "the prognosis is almost uniformly poor." This attitude is in contrast with civilian judges, who frequently demand psychiatric treatment for convicted homosexuals. The Service's first, second and third priority in dealing with homosexuals are, as stated, to get rid of them. I take it Commander Augenblick had his court-martial because, as a regular officer, he was immune to stigma type administrative discharge. *See, Carter* v. *United States*, decided today. All the court-martial did to him, however, was the stigma type discharge, which might have been inflicted administratively on a reservist.

I think the foregoing demonstrates that the Services have and have expressed a special and peculiar interest in setting their own course of dealing with their homosexuals, whether an offense is committed on or off the base, in or out of uniform, during working or leave time. Effectuating their policy is seen as a military necessity. Civilian judges could not possibly achieve the results demanded by the military. On the other hand, the Services do not desire either to reform the offender, or to inflict retribution for breach of the Mosaic law upon him. Except in the aggravated Class I cases, they are content to get rid of him albeit with a stigma type discharge in some instances, as here.

Conceding, however, that "service connection" would be a problem if one of the partners in the unnatural act had been a civilian (*United States* v. *Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969)) here they were both military, and one, Commander Augenblick, greatly outranked the other. As I conceive it—and we do not, I note again, have the help we should have from the military—the guilt of partners in crime or accomplices is never equal if one is an officer and the other an enlisted man. The former owes a duty to the latter to guide him into courses of right conduct. A breach of this duty would be an offense unknown to the civilian law. The latter is conceived to be without capacity to act on his own volition when in company of an officer and under his direction. That Commander Augenblick wore civilian clothes I do not think exonerated him from these duties, at least as long as the accomplice was uniformed.

He could not shed his obligations as an officer by putting on civilian clothes and going off the base for his contact. I do not think a civilian judge or jury could handle this situation in a satisfactory manner. I note that Colonel Munnecke enumerates this very case as one where the *victim* (his word) was a serviceman. (His fn. 5, p. 12). This is an appropriate classification of the case from a military point of view. The word "victim" is also used in the plaintiff's September 27, 1971, brief, albeit in quotation marks. The Commander would be regarded as having "preyed" on the enlisted man, in the word used in the Everhard article, *supra*. Counsel for Commander Augenblick have complained about the honorable discharge given the enlisted man, but the apparent disparity is fully explained by the considerations stated. He was a "victim".

Moreover, I would assign at least presumptive correctness to the decision by the Metropolitan police to turn the arrested offenders over to military custody. It was, by implication, a decision that the offense had "service connection", by the persons having to deal with the problem practically, at the working level.

In short, the application of the *O'Callahan* doctrine to this case is not a logical application of it but its *reductio ad absurdum*.

LARAMORE, *Senior Judge*, concurs in the opinion of Judge Davis and also concurs in the opinion of Judge Nichols regarding "service connection."